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No. 1243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

BROADWAY ENTERPRISE, INC.,
Petitioner,

vs.

BOARD OF LIQUOR CONTROL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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TABLE OF CONTENTS

CITATIONS TO OPINIONS BELOW 1-2

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2-4

STATEMENT OF THE CASE 4-5

REASONS FOR GRANTING THE WRIT 5-8

CONCLUSION 8

APPENDICES:

APPENDIX A.....10-11

Order of the Board of Liquor Control in *State of Ohio v. Broadway Enterprise, Inc.* 10-11

APPENDIX B.....12-16

Decision and Journal Entry of the Court of Common Pleas of Franklin County, Ohio in *Broadway Enterprise, Inc. v. Board of Liquor Control* 12-16

APPENDIX C.....17-28

Opinion of the Court of Appeals of Franklin County in *Broadway Enterprise v. Board of Liquor Control* 17-28

APPENDIX D.....29-30

Journal Entry of the Court of Appeals of Franklin County in *Broadway Enterprise, Inc. v. Board of Liquor Control* 29-30

APPENDIX E..... 31

Journal Entries of the Supreme Court of Ohio in *Broadway Enterprise, Inc. v. Board of Liquor Control* 31

CERTIFICATE OF SERVICE 9

CITATIONS

Cases

Amos v. U.S., 255 U.S. 313 (1721) 8
Boyd v. U.S., 116 U.S. 616 (1886) 7
Cleary v. Bolger, 371 U.S. 392, 403, 413-14 (1963) 6
Griffin v. Illinois, 351 U.S. 12, 18 (1956) 7
Johnson v. U.S., 333 U.S. 10 (1948) 8
Mapp v. Ohio, 367 U.S. 643 (1961) 6-8
McNabb v. U.S., 318 U.S. 332 (1943) 7
Weeks v. U.S., 232 U.S. 383 (1914) 7
Wolf v. Colorado, 338 U.S. 25 (1949) 7

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourth Amendment to U.S. Constitution, Section 1 ... 2, 7
Ohio Revised Code, Section 4301.10 (A), (6), (7), (8) . 3
Ohio Revised Code, Section 4301.66 .....3, 4, 8
Ohio Revised Code, Section 4301.68 ..... 4, 7
Ohio Revised Code, Section 4301.99 ..... 4, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. _____

BROADWAY ENTERPRISE, INC.,
Petitioner,

vs.

BOARD OF LIQUOR CONTROL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above-entitled case on December 1, 1965, Case Number 39324. Rehearing was denied on December 22, 1965.

CITATIONS TO OPINIONS BELOW

The decision of the Board of Liquor Control of the State of Ohio is unreported and is printed in Appendix A hereto, page 1. The decision and journal entry of the Court of Common Pleas of Franklin County, Ohio, are unreported and are printed in Appendix B, at page 12. The opinion of the Court of Appeals of Franklin County is reported in 1 Ohio App. 2d 470 (1965), 205 N.E. 2d 100, and is printed in Appendix C at page 17., and the journal entry of the Court of Appeals is printed in Appendix D at page 21. The journal entries of the Supreme Court of Ohio, over-

ruling petitioner's motion directing the Court of Appeals for Franklin County to certify its record and denying rehearing are unreported and are printed in Appendix E at page 31.

JURISDICTION

The Supreme Court of Ohio overruled petitioner's motion to certify the record on December 1, 1965, and rehearing was denied on December 22, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. May the Department of Liquor Control, by its investigators, take samples of a liquor permit holder's stock for purposes of conducting chemical analysis thereon, with a view to establishing a violation of a state statute?

2. Is evidence which has been obtained by unreasonable search and seizure to be excluded in a state administrative proceeding to suspend or revoke the permit of a licensee to engage in the business of selling alcoholic beverages?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1 . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Ohio Revised Code, Section 4301.10, provides in pertinent part:

"Section 4301.10. Powers and duties of department of liquor control.

(A) The department of liquor control shall:

* * *

(6) Inspect, upon demand, the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301. and 4303. of the Revised Code or the laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor, and the sale of alcohol;

(7) Delegate to any of its agents or employees any power of investigation which the department possesses and the powers of police officers with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor, provided that except in his report to the department or when called upon to testify in any court or proceeding, no such agent or employee shall divulge any information acquired by him with respect to the transactions or the business of any person while acting as such agent or employee, and if he does divulge such information he shall be disqualified forever from acting as agent or in any other capacity under the appointment or employment of the department;

(8) Exercise all other powers expressly or by necessary implication conferred upon the department by Chapters 4301. and 4303 of the Revised Code, and all powers necessary for the exercise or discharge of any power, duty, or function expressly conferred or imposed upon the department by such chapters."

Section 4301.66, Revised Code of Ohio, provides:

"Section 4301.66. Obstructing search of premises prohibited. (GC §6064-63)

"No person shall hinder or obstruct any agent or employee of the department of liquor control, or any officer of the law, from making inspection or search of any place, other than a bona fide private residence, where intoxicating liquor is possessed, kept, sold, or given away."

Section 4301.68, Revised Code of Ohio, provides:

> "Section 4301.68. Prohibition against sale or possession of diluted liquor and refilled containers. (GC §6064-68)
>
> "No person shall sell, offer for sale, or possess intoxicating liquor in any original container which has been diluted, refilled, or partly refilled."

Section 4301.99, Revised Code of Ohio, provides in pertinent part:

> "Section 4301.99. Penalties.
>
> * * *
>
> (E) * * *
>
> "Whoever violates division B of Section 4301.58 or Section 4301.59, 4301.60, 4301.66, or 4301.68 of the Revised Code shall be fined not less than One hundred nor more than one thousand dollars or imprisoned not less than ten days nor more than six months, or both. . . ."

STATEMENT OF THE CASE

This matter began in an administrative proceeding before the Board of Liquor Control of the State of Ohio when petitioner was charged with a violation of Section 4301.68, Revised Code, in the following language:

> "On January 23, 1962, your agent did have, keep and possess, in and upon the permit premises, for resale, spirituous liquor in original containers, which had been refilled, partially refilled or diluted in violation of the Liquor Control Act and the regulations of the Board of Liquor Control."

This violation is also made a criminal offense by Section 4301.99 (E), Revised Code.

At the outset of the proceedings before the Board of Liquor Control, the petitioner filed a motion for the return of certain of its property which had been seized on January 23, 1962, by agents of the Department of Liquor Control and for the suppresion of this evidence so seized by the

liquor agents on the basis of the exclusionary rule laid down by this Court in *Mapp v. Ohio,* 367 U.S. 643 (1961). Thereafter, at the time of the hearing before the Board of Liquor Control, the petitioner renewed its motion for the return of the seized property and the suppression of evidence. Simultaneously with the order and decision of the Board of Liquor Control, the Board overruled the renewed motion of the petitioner. Appendix A, at page 10 The Board then ordered a seventy day suspension of petitioner's Class D-5 liquor permit.

Petitioner appealed to the Court of Common Pleas of Franklin County from the decision of the Board overruling petitioner's motion for return and suppression of the evidence and from the decision of the Board suspending petitioner's Class D-5 liquor permit. On the 28th day of October, 1963, the Franklin County Court of Common Pleas affirmed the order and decision of the Board of Liquor Control, holding, "The doctrine of the notorious *Mapp* case finds no lodgment here." Appendix B, at page 12.

Petitioner then perfected an appeal to the Court of Appeals of Franklin County and again argued that the evidence had been improperly seized by the agents of the Department or Liquor Control and that the evidence should be returned and supressed under the doctrine of *Mapp v. Ohio, supra.* On August 11, 1964, the Court of Appeals affirmed. 1 Ohio App. 2d 470; 205 N.E. 2d 100; Appendix C, at page 17.

Petitioner then moved, in the Supreme Court of Ohio, for an order directing the Court of Appeals for Franklin County to certify its record. This motion was overruled on December 1, 1965. Appendix E at page 31. On December 10, 1965 a timely motion for rehearing was filed and on December 22, 1965, this motion was overruled. Appendix E at page 31.

REASONS FOR GRANTING THE WRIT

The fundamental problem presented herein is the application of the exclusionary rule as enunciated by this Court in *Mapp v. Ohio,* 367 U.S. 643 (1961) to a state administrative procedure, especially where the violation charged in the administrative proceeding is also a criminal offense. A secondary problem, that of implied consent to the search and seizure by the liquor license, is also present and pertinent here.

Since the Supreme Court of Ohio overruled petitioner's motion to certify the record, the Court of Appeals for Franklin County was the last Court to render an opinion in this case. That opinion is attached hereto in Appendix C at page .. and is reported at 1 Ohio App. 2d 470; 205 N.E. 2d 100. The essence of that opinion may be summed up by a quotation cited and approved by the Court of Appeals.

> ". . . A liquor permitee's premises are available for inspection without a search warrant, since the law against search without warrants has no application with respect to investigations of the liquor department." 31 Ohio Jurisprudence 2d 290, Intoxicating Liquors §258.

In taking such a position, the Court of Appeals appears to have enunciated a policy which runs contra to that of *Mapp,* supra. As this Court pointed out in *Mapp,* supra at 657, ". . . admitting evidence unlawfully seized serves to encourage disobedience to the Federal Constitution which [the State] is bound to uphold." This appears to be the rationale of this Court in *Mapp,* supra and is the distinguishing factor between *Mapp,* supra, and *Wolfe v. Colorado,* 338 U.S. 25 (1949) in that *Mapp* applies the exclusionary doctrine.

This Court has not yet decided whether *Mapp,* supra, applies in administrative proceedings. *Cleary v. Bolger,*

371 U.S. 392, 403, 413-14 (1963) (Concurring opinion of Justices Goldberg and Douglass). That issue is clearly raised by the instant case.

Although the cases have varried over the years in the application of the Fourth Amendment, they do appear unanimous in holding that it does forbid all unreasonable searches and is designed to safeguard the right of privacy. *Boyd v. United States,* 116 U.S. 616 (1863); *Weeks v. United States,* 232 U.S. 383 (1914); *McNabb v. United States,* 318 U.S. 332 (1943); *Wolf v. Colorado,* supra; *Mapp v. Ohio,* supra. By a process of distillation, these cases have been refined to lead to the Mapp exclusionary rule in state cases.

Since violation of Section 4301.68, Revised Code, is made a criminal offense by Section 4301.99 (E), Revised Code, the State had the option of criminal and/or administrative proceedings. But the State was under no obligation to make this election until after had illegally seized the evidence. In this manner, the State may substitute administrative proceedings for criminal proceedings and thereby deprive petitioner of its constitutional rights. If it is the purpose of *Mapp,* supra, to remove the encouragement to deprive defendants of their constitutional rights via exclusion of the poisonous fruit of an illegal search and seizure; then the argument should be equally as strong where the case involves an administrative proceeding which has, in effect, been used in lieu of a criminal trial.

Petitioner recognized that the liquor industry, especially at the retail level, is an extremely regulated business and that a state may not be required to grant a license to one to sell alcoholic beverages. But once that license is granted, the State may not act in a "highhanded" manner and deny petitioner its rights guaranteed by the Federal Constitution. See, *Griffin v. Illinois,* 351 U.S. 12, 18 (1956).

There is nothing in the record to show that petitioner waived its constitutional rights afforded by the Fourteenth Amendment. Mere submission to authority is not consent. *Johnson v. United States,* 333 U.S. 10 (1948); *Amos v. United States,* 255 U.S. 313 (1721). If Mr. Wiefel, President of petitioner corporation, had attempted to resist the illegal search and seizure of his property, he would have been in violation of Section 4301.66, Revised Code, which makes it a crime to "hinder or obstruct" a liquor control agent from making this sort of search. The agents' inspection was "demanded under the color of office" and the petitioner's cooperation was given "in submission to authority rather than as an understanding and intentional waiver of a constitutional right." *Johnson v. United States,* 333 U.S. at 13.

This Court promised in *Mapp,* supra, "to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct." 367 U.S. at 654-55. This promise will continue to be significant only if evidence barred at the courtroom door is also refused admission via the backdoor of the administrative proceeding room.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM J. ABRAHAM,
DAVID K. PURKEY,
16 East Broad Street, Columbus, Ohio,
Attorneys for Petitioner.

CERTIFICATE

The undersigned hereby certifies that he is duly admitted to practice before this Court and that he has personally served a copy of the petition for a writ of certiorari on the Attorney General of the State of Ohio on the 21st day of April, 1966.

WILLIAM J. ABRAHAM,
Counsel for Petitioner.

APPENDIX A

"Before The Board of Liquor Control, State of Ohio

BROADWAY ENTERPRISE, INC.
dba Broadway Grill
3770 West Broad Street
Columbus, Ohio
Franklin County
Class D-5 Permit
Certificate No. 311877 (7-30-62)

Docket No. 2860
Case No. 27860
219 South High Street
Columbus, Ohio
April 10, 1963.

This cause came on to be heard on the charge brought against the above permit holder, to-wit:

> "On January 23, 1962, your agent did have, keep and possess, in and upon the permit premises, for resale, spirituous liquor in original containers, which had been refilled, partially refilled or diluted—in violation of the provisions of the Liquor Control Act and the regulations of the Board of Liquor Control."

and said permit holder was duly served with a copy of said charge and notice of the hearing thereon.

Thereupon counsel for the permit holder herein moved for a return of certain property alleged to have been unlawfully seized from the place of business of Broadway Enterprise, Inc. by agents of the Department of Liquor Control of the State of Ohio, and further moved that said property be suppressed as evidence in the within cause; said motion was submitted to the Board of Liquor Control, and upon consideration, thereof, said Board finds that the motion was not well taken and hereby denies the same.

And said permit holder, appearing before the Board of Liquor Control to answer said charge, denied the same, and thereupon the matter was submitted to the Board of Liquor Control on the evidence; and said Board, in consideration thereof, finds that the allegations of the Director of Liquor Control are well taken and supported by the evidence and orders the above permit suspended.

It is therefore ordered and adjudged that Class D-5 Permit, Certificate No. 311877, be, and the same hereby is suspended for a period of seventy (70) days, said suspension to be served consecutively to the thirty-five days suspension imposed by the Board of Liquor Control in Case No. 28234, to-wit, beginning at noon May 28, 1963, and ending at noon, August 6, 1963.

It appears to the Board of Liquor Control that the aforesaid Class D-5 permit will expire prior to the termination of the suspension ordered herein, therefore, it is a condition of the order that if the said permit is renewed by the Director of Liquor Control for the permit year 1963-1964 during the aforesaid suspension period, it is the order of the Board that any unserved portion thereof at the time of reissuance shall be applied to the newly issued certificate.

BOARD OF LIQUOR CONTROL
STATE OF OHIO

KENNETH E. THOMAS, *Chairman*

ESTHER R. HARDY, *Member*

JOHN BENSON, *Member*

Member Bernard P. Sacharow—Not Participating.

Mailed 4-16-63.

APPENDIX B

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

No. 216,939

IN THE MATTER OF BROADWAY ENTERPRISE, INC.
dba Broadway Grill, etc.,
Appellant,

DECISION

Rendered this 25th day of October, 1963.

SATER, J.

This is an appeal from a 70-day suspension for the sale of alcoholic beverages from bottles that had been refilled, partially refilled or diluted, in violation of Revised Code, Section 4301.68 and Department Regulation No. 47. The factual pattern of this case is so inextricably similar to that in our cases *James W. Moore, etc. vs. Board,* No. 217,280 and *Dinty Moore's Inc. vs. Board,* No. 216,748, that in this case we overrule the renewed motion to suppress evidence and also deny the appeal.

In this case the Department chemist and an investigator went, as the result of a complaint of dilution or refilling, to the permit premises. It does not matter significantly where or how the complaint originated; the key fact is that it did; and it is the duty of the Department to investigate and, if necessary or proper, to penalize. On arrival at appellant's premises, the chemist and the investigator showed their credentials, as required, to identify themselves to the barmaid, Cachio, on duty, who called appellant to notify him what was going on. The chemist "stemmed" four or five bottles on the back bar and found enough discrepancy to require closer, laboratory analysis. The officers

had no search warrant but they took 12 bottles, replaced the pourers with corks, sealed, strip stamped and marked the bottles, and took them with them to Deparmental offices in this city for close analysis. Cachio, who was right there, heard no complaint over the confiscation of the bottles.

For such action and removal, the officers needed no search warrant. To require it in such cases as this, is to make a mockery of enforcement of the Liquor Law. Appellant, as has been held in too many cases, has by participation in the business of selling alcoholic beverages, engaged in a business that requires the closest supervision, inspection and regulation; these are occupational hazards similar to the penalty for sale to minors and to intoxicated persons, yet who contests the power and authority of Departmental officers to confiscate in those cases without a warrant? To ask the question is to answer it. Furthermore, the legislative requirement of a warrant in a few situations, while not mentioning that requirement in all others, does not argue a lack of Departmental authority to act in all of the other cases; it argues a careful consideration by the Legislature in placing different kinds of violations into carefully selected categories. The doctrine of the notorious *Mapp* case finds no lodgment here.

The bottles confiscated remained in the chemist's custody from the time of removal to the time of complete analysis after which citation was issued, and then until hearing was had before the Board. It is undisputed that contents of all but three of the bottles showed from one-half to five proof off of required formula. The variation in congeneries and esters was much greater than that. The analysis coincided with the range of neither manufacturer's nor Departmental formula. In lay language, the contents of most of the bottles had been cheapened; the result was slightly greater profit to appellant on each sale. It may be true that neither appel-

lant nor Cachio saw, approved or participated in a dilution but there can be no question but that a diluent was present in nine of the twelve bottles. Finally on this matter, the bottles were all so new that the use of the capped stoppers prevented any structural variation by evaporation; this means that the dilution or refilling was deliberate.

An interesting sidelight to this case is that in the month beginning December 8, 1961, appellant bought at wholesale many bottles but few of them were of the brand called PM. Yet in the month before that and although it was a cheap but statedly not a very good seller at all on the permit premises, appellant had so bought a surprisingly large number of bottles of PM. In this period, appellant fired bartender Harris who told appellant that he would get even with him. One wonders who profited financially from the dilution. We will probably never know. But the dilution was there beyond question.

KENNETH L. SATER,
Judge.

APPEARANCES:

BROOK ALLOWAY,
Attorney for Appellant,

JOHN R. COLE, Asst. Atty. General,
Attorney for Defendant.

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

IN THE MATTER OF BROADWAY ENTERPRISE, INC.
dba Broadway Grill
3770 West Broad Street,
Columbus, Ohio,

Appellant,

vs.

BOARD OF LIQUOR CONTROL,
STATE OF OHIO,

Appellee.

JOURNAL ENTRY

This cause came on to be heard upon the appeal of the appellant-permit holder from the decision and order of the Board of Liquor Control and upon the renewal motion of appellant-permit holder to suppress the evidence and the Court, being fully advised in the premises finds said motion not well taken and overrules the same.

This cause came on further to be heard upon the appeal of appellant-permit holder from the decision and order of the Board of Liquor Control and upon the briefs and arguments of counsel, and the Court being fully advised in the premises finds that such decision and order is supported by reliable, probative and substantial evidence and in accordance with law and that said appeal is not well taken and should be denied.

It is therefore ORDERED, ADJUDGED and DECREED that the order and decision of the Board of Liquor Control be and the same is hereby affirmed. The court further orders that, if timely appeal is filed to the Court of

Appeals from the judgment and final order of this court, the prior order of this court staying execution of the order of the Board of Liquor Control shall continue during the pendency of each appeal; in the absence of such timely filing of such Notice of Appeal, said order staying execution of the order of the Board of Liquor Control shall be vacated and dissolved. Costs to appellant-permit holder.

To all of which appellant excepts.

KENNETH L. SATER,
Judge.

APPROVED:

TOPPER & ALLOWAY,
Attorneys for Appellant,

WILLIAM B. SAXBE,
Attorney General,

JOHN R. COLE,
Assistant Attorney General.

APPENDIX C

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

IN THE MATTER OF BROADWAY ENTERPRISE, INC.,
dba Broadway Grill,
Appellant-Appellant,

vs.

BOARD OF LIQUOR CONTROL,
Appellee-Appellee.

OPINION

Rendered on August 11, 1964.

TOPPER & ALLOWAY,
MR. R. BROOKE ALLOWAY, *of Counsel,*
17 South High Street,
Columbus, Ohio,
For Appellant-Appellant.

MR. WILLIAM B. SAXBE, *Attorney General,*
MR. LARRY G. BRAKE AND
MR. DAVID L. KESSLER, *Assistants,*
State House Annex,
Columbus, Ohio,
For Appellee-Appellee.

BRYANT, J.

The proceeding now before this court on appeal on questions of law was begun before the board of liquor control (now liquor control commission), appellee herein, hereinafter called the "board."

The department of liquor control filed charges before the board against Broadway Enterprise, Inc., dba Broadway Grill, 3770 West Broad Street, Columbus, Ohio, the

holder of a Class D-5 night club liquor permit, appellant herein, hereinafter called "Broadway."

In the citation filed with the board, it was alleged that Broadway violated a provision in the liquor control act, Section 4301.68 of the Revised Code, and also regulation 47 of the board. Both the statute and regulation prohibit the refiling in whole or in part of original containers of spirituous liquor with any beverage or substance whatsoever.

Sought to be prohibited by the foregoing, among other things, are "the cutting" of spirituous liquor by the addition of water or other diluents, the use of untaxed bootleg liquor masquerading in bottles labeled as expensive brands, and other practices defrauding the state of taxes, sometimes endangering the public health and working a fraud on the public.

The charge filed by the department against Broadway reads as follows:

> "On January 23, 1962, your agent did have, keep and possess, in and upon the permit premises, for resale, spirituous liquor in original containers, which have been refilled, partially refilled or diluted—in violation of the provisions of the liquor control act and the regulations of the Board of Liquor Control."

Section 4301.68, supra, reads as follows:

> "No person shall sell, offer for sale, or possess intoxicating liquor in any original container which has been diluted, refilled, or partly refilled."

Regulation 47 of the board reads as follows:

> "No holder of a permit authorizing the sale by the glass, or any agent or employee thereof, shall refill any bottle formerly containing alcoholic beverages.
> "No permit holder, by himself, his agent or employee, shall sell or deliver to any patron any brand or variety of alcoholic beverage other than that which has been ordered or requested, without the consent or approval of such patron."

After four continuances, the matter came on for hearing on April 3, 1963, upon a plea of not guilty entered on behalf of Broadway by its counsel. On behalf of the department, testimony was offered of H. C. Prisk, chief chemist of the department of liquor control, and Ralph Rutherford, manager of the wholesale liquor store, from which Broadway purchased intoxicating liquors for sale on the permit premises. The department also called Frank Wiefel, president of Broadway, as upon cross-examination.

On behalf of Broadway, there was offered testimony of Wiefel on direct examination and also of Mrs. Lucille Cachio, a barmaid employed at Broadway.

There is but little dispute in the testimony. Prisk testified that on January 23, 1962 (R. 9) he and a liquor control investigator identified as Mr. Drummond (R. 10) acting on a complaint (R. 17) entered the Broadway Grill, identified themselves to Mrs. Cachio by displaying their identifications and asked to stem or gauge whiskey exhibited for sale on the back bar of the night club. Mrs. Cachio asked them to wait until she called the owner, which they did. In a short while, Wiefel arrived, was informed of the identity of the two representatives of the department of liquor control and consented (R. 11) for them to proceed. Prisk described his qualifications in considerable detail and told of a special hydrometer which would determine with great accuracy the percentage of alcohol in any beverage. He also told of the formulae furnished by the distillers and of repeated tests run by him as chief chemist of the department.

Prisk stated that at least one of the bottles on the back bar (department exhibit K)—Fleischman's—"is way off proof." (R. 34.) He testified that as manufactured this brand is 90 proof whiskey but the bottle on the back bar

tested 86 proof, which fact he said would "speak for itself."

In all, twelve fifths of whiskey were taken as suspected of being diluted and a fair appraisal of the testimony of Prisk is that all except department exhibit L were clearly in violation and many of them had the characteristics of PM whiskey, which was department exhibit L.

Store Manager Rutherford testified that Broadway on December 8, 1961, purchased twelve bottles of PM whiskey, on December 15, 1961, purchased twelve bottles of PM whiskey, on December 27, 1961, "24 bottles purchased," on December 29, 1961, "12 bottles purchased," on January 5, 1962, "24 bottles purchased." (R. 56.)

On behalf of the permit holder, despite the plea of not guilty, no evidence was offered to dispute a claim of the department that PM whiskey had been used to refill many if not most of the samples taken from the back bar. On the contrary, Wiefel by inference seemed to admit that this did or may have happened, attributing it to a disgruntled employee discharged by him a short time before. Both Wiefel and Mrs. Cachio confirmed the testimony of Prisk that both representatives of the department identified themselves, that a list of items taken for laboratory testing was prepared in the night club at the time and signed by both Prisk and Wiefel with one copy left with Wiefel.

On hearing the evidence, the board took the matter under advisement and on April 10, 1963, handed down a decision finding Broadway guilty as charged and imposing a suspension for a period of seventy days "said suspension to be served consecutively to the thirty-five days suspension imposed by the board in case 28234 to wit, beginning at noon May 28, 1963, and ending at noon August 6, 1963." The record does not disclose the nature of the charge which

resulted in the thirty-five day suspension referred to in the board's order.

On appeal to the common pleas court of Franklin County, Ohio, by Broadway, the judgment, order and suspension of the board were affirmed in all respects. The permit holder prior to the hearing before the board made a motion to suppress the evidence, claiming the twelve bottles were illegally obtained. This was overruled by the board, and on appeal, the court below sustained the position taken by the board in refusing to suppress the evidence.

Among the errors assigned on appeal to this court (assignment 6), it is contended that the action of the court below in affirming the seventy-day suspension imposed by the board is "unlawful, unreasonable, arbitrary and constitutes a gross abuse of discretion." With that, we find ourselves unable to agree. We are not concerned here with the exact number of days suspension called for in this case. The record does, however, disclose three prior convictions including the following (R. 72):

> "June 29, 1952, Sunday sales. Twenty-day suspension. February 11, 1955, sales to minors. Twenty-day suspension. April 13, 1958, Sunday sales. Fourteen-day suspension."

The question before this court, however, primarily is the lawfulness of the order of the court below in affirming the order of the board imposing a seventy-day suspension. From the journal entry incorporating the decision of the court below, we observe that that court found and determined that the order of the board was "supported by reliable, probative and substantial evidence and in accordance with law."

As we understand the law, the power of the court below is limited to the ground set forth in Section 119.12 of the Revised Code, and that court having found that the evi-

dence met the required test, lacked the authority to modify the penalty. The Supreme Court of Ohio has made this determination in *Henry's Cafe, Inc., v. Board of Liquor Control et al.* (1959), 170 Ohio St., 233, in which the second and third paragraphs of the syllabus read as follows:

> "2. On appeal from an order of an agency (as defined in Section 119.01, Revised Code) to the Court of Common Pleas, the power of the court to modify such order is limited to the ground set forth in Section 119.12, Revised Code, i.e., the absence of a finding that the order is supported by reliable, probative, and substantial evidence.
>
> "3. On such appeal, the Court of Common Pleas has no authority to modify a penalty that the agency was authorized to and did impose, on the ground that the agency abused its discretion."

See also the decision of this court in *State Racing Commission v. Robertson* (1960), 111 Ohio App., 435, third paragraph of the syllabus. It follows, therefore, that the sixth assignment of error is not well taken and must be overruled.

The second assignment of error reads as follows:

> "2. In failing to find that the citation should be dismissed because of the non-compliance by the Department of Liquor Control with the provisions of Regulation 61-A of the rules and regulations promulgated by the Board of Liquor Control."

Board Regulation 61-A reads as follows:

> "A. If an investigator of the Enforcement Division of the Department witnesses a violation of a provision of the Liquor Control Act or a regulation of the Board, the investigator shall upon completion of his investigation identify himself by presentation of his credentials to the permit holder or such permit holder's agent or employee, and notify the permit holder or his agent or employee of the violation in writing on the forms prescribed and provided by the Department and approved by the Board. The original notice to be left

with the permit holder or his agent or employee and copies of such notice shall be forwarded within 48 hours to the Central Enforcement Office, the District Enforcement Office, and one copy retained by the investigator making such report."

On page 19 of the brief filed on behalf of Broadway, there appears the following statement:

"As previously pointed out in this brief, the inspector of the Department of Liquor Control was on the permit premises on January 23, 1962, at which time he seized certain bottles of whiskey on the permit premises. A notice of violation resulting from that seizure was not served upon the permit holder until March 12, 1962."

It is beyond dispute that the investigator and chief chemist of the department identified themselves both to the barmaid and later to the president of Broadway. It is also undisputed that the preliminary test of the proof for alcoholic content of the intoxicating liquors on the back bar of Broadway was made in the presence of Wiefel and the barmaid. It is also undisputed that a list was made up in considerable detail fully describing the twelve bottles which were identified as exhibits A through L, which were taken for laboratory tests. While it appears that several weeks elapsed between the time of the visit to Broadway and the notice of violation, we note also that requlation 61-A, supra, requires the notice to be served on the permit holder "on completion of his investigation."

It seems clear to us upon reading the record in this case that so far as actual notice is concerned, the permit holder in fact was fully notified at the time of the visit and received the written list of bottles taken for testing at that time. If he did get the violation notice on March 12, 1962, it would appear he had adequate time to make whatever investigation he chose for the matter did not come on for hearing due to the continuances until more than one year

later. We do not believe the permit holder was prejudiced from which it follows, in our opinion, that the second assignment of error must be overruled.

The first assignment of error reads as follows:

> "In affirming the action of the Board of Liquor Control in overruling the written and oral motions of the appellant to return certain bottles of whiskey seized from the premises of the appellant by an agent of the Department of Liquor Control without a search warrant, and to suppress the knowledge obtained therefrom as evidence."

It is the contention on behalf of the permit holder that the twelve bottles taken for testing were illegally obtained and that the board erred in overruling the motion to suppress these bottles as evidence and any testimony in connection with them. It was also contended that the court below erred in affirming this action by the board. This contention on behalf of Broadway is given the principal emphasis in the brief filed on behalf of Broadway. It therefore becomes important to determine the circumstances under which possession of the twelve bottles of spirituous liquor identified as exhibits A through L was obtained. It is not contended, nor could it be, that there was any illegal entry for several reasons among them, that the place was open for business, and further the property in question was clearly inside the permit premises. There can hardly be any doubt from a reading of the liquor control act, Section 4301.01 et seq., that the state in the issuance of permits and regulation of their use intended to keep a close check upon their operations, and one of the methods chosen was the right to make an inspection of the entire premises at any time. The reasons for this are well stated in a per curiam opinion of the Supreme Court of Ohio in *Stouffer Corp. v. Board of Liquor Control et al.* (1956), 165 Ohio St., 96, wherein it is stated at page 99:

> "It is obvious that the liquor business, although legal by Ohio law, has in it such dangers that it is entirely subject to the police power of the state and may, in fact, be prohibited. Under Ohio law, providing for local option, a large part territorially of the state prohibits traffic in intoxicating liquors. A license, or a right to such a license, to engage in the liquor business is not an inherent right of a citizen, a contract or a property right. *State, ex rel. Zugravu v. O'Brien,* 130 Ohio St., 23, 196 N.E., 664. It is apparent, therefore, that, fine and expensive as appellant's restaurant may be, it has no inherent or property right to a liquor license since such license is a mere privilege conferred by the state."

It is also clear from the record in this case that the two representatives of the department acting upon a complaint sought to test the bottles of spirituous liquor on the back bar, and it is nowhere in dispute that they were given consent so to do by Wiefel, president of Broadway. It is also clear that at least one of the samples tested did not meet the required test, there being a substantial variance in the proof or percentage of alcoholic content.

With reference to the right to inspect the premises of a permit holder, 31 Ohio Juprisprudence (2d) 290, Intoxicating Liquors, §258, provides in part as follows:

> "* * * A liquor permittee's premises are available for inspection without a search warrant, since the law against search without warrants has no application with respect to investigations of the liquor department."

In this connection the court of appeals of Franklin County, Ohio, in the case of *State of Ohio, ex rel. Argonne Post No. 545, American Legion v. Board of Liquor Control et al.* (1953), 131 N.E. (2d), 245, at 254, wrote as follows:

> "The further prayer of the amended petition is for a writ of mandamus requiring the respondents to return to relator the three slot machines admittedly

found on the permit premises but claimed to have been locked in a separate room and not used for gambling purposes. The argument of relator is that such slot machines were unlawfully taken because no search warrant had been obtained. We agree with the statement of the trial judge in his opinion, as follows: " 'Anyone granted a permit is subject to all the Department's requlations which are applicable to him and an inspection of the permit premises without a search warrant is not a violation of any of his constitutional rights. The moment he becomes a permit holder his permit premises are no longer private and the law against search without warrant has no application with respect to investigations of the Liquor Department.' "

We note in this case that the chief chemist for the department upon completion of the various tests came to the conclusion that every one of the samples taken with one exception gave evidence of having been diluted, the diluent apparently being PM whiskey, which with one or two exceptions was less expensive than the brands originally contained in the bottles labeled exhibits A through K.

After the department introduced evidence indicating that Broadway had made substantial purchases of PM whiskey during the several weeks prior to the visit by the investigator and chief chemist of the department, Broadway offered testimony that PM was used as a special. It is apparent that the board placed but little credence on this explanation and that the board accepted as true the testimony of the chief chemist that nearly all of the exhibits were in violation as charged in the citation. As the record discloses, there was some substantial and credible evidence on every material issue required to be proven to establish the charges contained in the citation. We do not believe the court below erred in so holding.

On behalf of Broadway, it is contended (Broadway's opening brief, pp. 11-13) that the bottles seized should not

have been taken because they contained legal intoxicating liquor which had not been declared contraband. With this statement, we must disagree for the reason that under the provisions of Section 4301.68, supra, it is a misdemeanor punishable (Section 4301.99 (B)) by a fine of from $100 to $1,000 and imprisonment from ten days to six months, or both, to "sell, offer for sale, or possess" intoxicating liquor under the circumstances charged in the citation. Evidence of the type offered here, if believed, is sufficient. See *State of Ohio v. Watson* (1962), 117 Ohio App., 333.

Counsel for Broadway have cited several decisions upon which they place reliance. One of them is the decision of the Supreme Court of Ohio in the case of *Wacksman v. Harrell, City Manager* (1963), 174 Ohio St., 338. This case was an action for a declaratory judgment to test the validity of certain rules announced by the chief of police of Cincinnati, Ohio in dealing with allegedly stolen property which had been pawned. We feel that the facts in the *Wacksman* case, supra, being so entirely foreign to the facts in this case that it offers no help here.

Reliance also is placed upon a decision by the Supreme Court of the United States in *Mapp v. Ohio* (1961), 367 U.S., 643, reversing *Ohio v. Mapp* (1960), 170 Ohio St., 427. Here again the facts are materially different. In the *Mapp* case, supra, members of the Cleveland police department broke into a private residence, the home of Mrs. Mapp, and against her orders and wishes, searched the entire residence and found the allegedly illegal pictures during that search. It can hardly be contended that the permit premises of Broadway is a residence or dwelling house. In fact, counsel for Broadway does not question the right of the investigator and chief chemist of the department to visit the bar at the time they did. The *Mapp* case,

supra, also involved an indictment for a felony, which further distinguishes it from the case now before the court.

One further case should be mentioned. That is the decision of the Supreme Court of Ohio in *Grieb v. Department of Liquor Control* (1950), 153 Ohio St., 77. Again the facts are so different as to render the decision inapplicable to the present case. In the *Grieb* case, supra, the permit had been revoked and for this reason only the department of liquor control sought to confiscate and destroy intoxicating liquor entirely legal in all respects except that the owner's permit had been revoked.

Here it is the claim of the prosecution that the liquor itself was illegal due to alleged refilling, partially refilling or diluting intoxicating liquor in original containers. The decision in the *Grieb* case, supra, dealt with liquor in all respects entirely legal. The first assignment of error is not well taken and must be overruled.

We have considered the other errors assigned and have concluded that they are without merit and must be overruled. The several errors assigned and each of them must be overruled, the judgment of the court below affirmed and the cause remanded.

DUFFY, P. J., and TROOP, J., Concur.

APPENDIX D

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 7586

BROADWAY ENTERPRISE, INC.,
Appellant,

vs.

BOARD OF LIQUOR CONTROL,
Appellee.

JOURNAL ENTRY

This cause came on for the consideration of the Court from the judgment of the Court of Common Pleas of Franklin County rendered October 28, 1963 wherein said Court affirmed the order and decision of the Board of Liquor Control which had suspended appellant's Class D-5 Permit for a period of seventy (70) days.

After considering the transcript of the proceedings before the Board of Liquor Control, the proceeding in the Common Pleas Court, and the briefs and arguments of counsel, the Court finds that the judgment of the Common Pleas Court is in accordance with law and that the errors assigned by appellant are without merit and must be overruled.

It is, therefore ORDERED, ADJUDGED, and DECREED that the judgment of the Common Pleas Court be and hereby is affirmed. It is further ordered that this cause be remanded to the Liquor Control Commission for further proceedings not inconsistent with the decision of this Court.

Costs to appellant. To all of which appellant excepts.

JOHN C. DUFFEY, *Judge*
WILLIAM C. BRYANT, *Judge*
HORACE W. TROOP, *Judge*

APPROVED:

TOPPER & ALLOWAY
Attorneys for Appellant

WILLIAM B. SAXBE,
Attorney General

J. RICHARD LUMPE,
Assistant Attorney General
Attorneys for Appellee

APPENDIX E

JOURNAL 47 PAGE 342

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

JOURNAL 47 PAGE 372

REHEARING

It is ordered by the Court that rehearing in this case is denied.